

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

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| State of Oklahoma, |) | Case No. 4:05-cv-00329-GKF-PJC |
| |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | DEFENDANTS' JOINT MOTION TO |
| |) | STRIKE THE SUPPLEMENTAL |
| |) | TESTIMONY OF MICHAEL W. |
| Tyson Foods, Inc., et al., |) | HANEMANN & BARBARA KANNINEN |
| |) | |
| Defendants. |) | |
| |) | |

Pursuant to Fed. R. Civ. P. 37(c)(1), Defendants jointly move the Court to enter an Order striking portions of the June 19, 2009 declarations of two of Plaintiffs' contingent valuation experts, Michael Hanemann and Barbara Kanninen, which Plaintiffs attached to their motion to exclude the opinions of Defendants' experts Drs. William Desvousges and Gordon Rausser. (Dkt. Nos. 2270-23 (Hanemann) and 2270-5 (Kanninen).) Because the declarations contain new opinions and additional information not previously disclosed as required by Rule 26, they amount to supplements to Hannemann and Kanninen's expert report (the Stratus report). Plaintiffs are barred by Rule 37(c)(1) from using this information as evidence to support any motion or at trial, and the Court should strike and not give further consideration to the declarations.

BACKGROUND

Plaintiffs' expert reports concerning damages were due to be produced in January 2009. On January 5, 2009, Plaintiffs submitted an approximately one-hundred-and-fifty-page expert report by Stratus Consulting prepared by Hanemann, Kanninen, and five others, along with approximately five-hundred pages of appendices. (See Dkt. Nos. 1853-4 (report), 1883-9

(Appendix A), 1883-10 (Appendix B), and 2278-7—2278-12 (Appendix D).¹) Hanemann and Kanninen were primary authors of these reports.² Defendants deposed Kanninen on April 28, 2009 and Hanemann on May 5, 2009.

The Stratus report discussed the following: Stratus experts' approach to natural resource damages, the valuation of injuries, the theory and measurement of economic value, development of the contingent valuation survey itself (including a discussion of scope tests and confidence intervals), administration of the contingent valuation survey, the distribution of responses and tests of validity, and the estimate of natural resource damages. (See Dkt. No. 1853-4.)

On June 19, 2009, Plaintiffs served Defendants with two new Stratus declarations. (Dkt. Nos. 2270-5, 2270-23.) The declarations contain new opinions concerning the Turnbull and ABERS estimators and new analysis, as well as new materials not included in the experts' report. These opinions, which are the basis of this motion to strike, were not previously disclosed to Defendants.

LEGAL STANDARD

The legal standard for reviewing supplemental expert reports is set forth in Defendants' Motion to Strike Plaintiffs' New and Undisclosed Expert Opinions (Dkt. No. 2241) and, in the interest of judicial economy, Defendants incorporate the legal analysis in that brief by reference. In short, this Court has declared that a report that attempts to "strengthen or deepen" the original opinions expressed by the expert exceeds the bounds of permissible supplementation. (Id. at 4 (citing Jan. 29, 2009 Ord.: Dkt. No. 1839).) Where, as here, Defendants are faced with

¹ Appendices B and E-H have not been docketed with the Court.

² This does not include the 23-page past damages report which Dr. Hanemann, but not Dr. Kanninen, coauthored.

declarations that are “essentially ... new expert report[s] with new opinions, and defendants would need to depose [the expert] before trial to prepare a meaningful Daubert challenge,” the report should be stricken. Palmer v. Asarco Inc., 03-CV-0498, 2007 U.S. Dist. LEXIS 56969, at *13 (N.D. Okla. Aug. 3, 2007).

DISCUSSION

As summarized elsewhere in the record of this case, the Court has previously commented about improperly supplementing expert reports. (See Dkt. No. 2241: Defs.’ Mot. Strike Pls.’ New & Undisclosed Expert Opinions at 1-3.) Here, well after the deadline for expert reports on damages, Plaintiffs submitted new opinions and analyses by two of the Stratus experts. Unless stricken, these new opinions will prejudice Defendants. The only adequate alternative cure for such prejudice would be to allow further depositions of Drs. Hanemann and Kanninen, adequate opportunity to prepare and file rebuttal reports on the new opinions expressed, and an opportunity to supplement the Daubert briefing (Dkt. No 2272) already submitted to the Court seeking to exclude the unreliable and biased opinions of the Stratus experts, including Hanemann and Kanninen.

A. The Opinions Expressed in Hanemann and Kanninen’s June 2009 Declarations Are New.

Plaintiffs improperly use the new Hannemann and Kanninen declarations to bolster, “strengthen and deepen” the Stratus report. (See Jan. 29, 2009 Order: Dkt. No. 1839.)

Dr. Hanemann’s June 19, 2009 declaration (Dkt. No. 2270-23) cites to new sources, not included in his report, and performs additional analysis:

- Paragraph 18 contains new data analysis in support of Plaintiffs’ use of the ABERS estimator.
- Paragraph 26 contains unsupported opinion and incorporates ¶ 18’s new data analysis.

- Paragraph 21 introduces an e-mail dated June 15, 2009 from Professor Haab, the author of a book cited by Drs. Desvousges and Rausser in their critique of the Stratus report. This e-mail forms the basis of Hanemann's new opinions in ¶¶ 22-26. The e-mail is not a sworn statement or a peer reviewed article. See Fed. R. Evid. 801(c).

Plaintiffs couch these paragraphs as rebuttal, but Hanemann did **not** use both the ABERS and Turnbull estimators in the Stratus report. Hanemann now attempts to get around this by running the Turnbull estimator on a set of "made up" data. The dispute in this case is the treatment of the *actual* data under the Turnbull and ABERS estimators. Hanemann's analysis of made up data is irrelevant, and to the extent is it meant to apply to the actual data in the case, it constitutes new analysis.

- Paragraph 17 contains Hanemann's new and unsupported opinion regarding the Haab and McConnell book on estimators.
- Attachment 1 consists of Hanemann's new analysis of the "made-up" data. Attachment 2 is the unsworn statement by e-mail of Dr. Haab. Attachments 1 and 2 should be stricken from the record.
- Paragraph 10 cites to new papers by Coslett, and McFadden, as well as books by Morgan, and Barlow. None of these are cited in the Stratus Report. These sources provide the basis for Hanemann's opinions on the ABERS estimator found in ¶¶ 11-14 of the declaration.
- Paragraphs 33 and 34 refer to new material not cited in the Stratus Report. The opinions in ¶¶ 33 and 34 are improper bolstering of the Stratus experts' results.

Dr. Kanninen's June 19, 2009 declaration (Dkt. No. 2270-5) also cites to additional sources not cited in the Stratus Report:

- Paragraph 20 refers to two new articles (Turnbull 1974) and (Turnbull 1976) not cited in the Stratus Report.

The Court should strike all paragraphs listed above from the two June 19, 2009 Stratus declarations because they offer new opinions and introduce new materials not included in the original Stratus report. See, e.g., Palmer, 2007 U.S. Dist. LEXIS 56969, at *13.

B. Hanemann and Kanninen's New Opinions Are Highly Prejudicial to Defendants and the Harm Is Incurable Absent Striking the Declarations.

Hanemann and Kanninen's new opinions on the Trunbull and ABERS estimators comes as a surprise to Defendants, since these opinions were entirely omitted from the January 2009 Stratus report. The topic of *estimators* was addressed in the Stratus report, and Defendants

rebutted those opinions. Plaintiffs now seek to bolster their discredited opinions on estimators by offering new evidence and testimony through the new Stratus declarations. (See Dkt. No. 2270-23 ¶¶ 10-14, 17-18, 21-26, 33-34, Attachments 1 and 2; Dkt. No. 2270-5 ¶ 20.) Because the Trunbull and ABERS opinions are new, Defendants 1) had no opportunity to question Hanemann and Kanninen about these opinions, 2) did not charge their own experts with rebutting Hanemann and Kanninen's new positions on estimators or the new sources and considered materials on which the declarations purportedly rely, and 3) had no opportunity to analyze and refute Hanemann and Kanninen's new opinions in Defendants' Daubert challenge to the Stratus experts' unfounded opinions (Dkt. No. 2272). The declarations constitute nothing more than improper bolstering.

Defendants dispute the validity of Hanemann and Kanninen's new opinions, which are replete with inaccuracies and are highly misleading at best. To fully rebut these new opinions, Defendants would need to reexamine Hanemann and Kanninen in a supplemental deposition, reexamine the rebuttal of the new opinions with Defendants' own experts, and to supplement their Daubert briefing if appropriate. Given the impermissible bolstering of the Stratus opinions long after the close of expert discovery and so close to trial, Defendants submit that the Court should strike the June 19, 2009 Stratus declarations. See Fed. R. Civ. P. 37(c)(1) ("If a party fails to provide information ... as required by Rule 26(a) or (e), the party is not allowed to use that information ... to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.").

CONCLUSION

As Plaintiffs have provided no basis for the untimely disclosure of Hanemann and Kanninen's new opinions contained in the June 19, 2009 declarations, and given the prejudice to

Defendants and the likelihood of the derailment of the trial should their new opinions be considered, the Court should strike the declarations.

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CERTIFICATE OF SERVICE

I certify that on the 14th day of July, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and a true and correct copy of the foregoing was sent via separate email to the following:

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